No. 21,503

In the United States Court of Appeals for the Ninth Circuit

GOVERNMENT OF GUAM, ex rel. CARLOS G. CAMACHO and G. RICARDO SALAS, APPELLANTS

v.

HORACE V. BIRD, APPELLEE

On Appeal from the Order of the District Court of Guam

BRIEF FOR THE APPELLEE

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OPINION BELOW

The findings of fact and conclusions of law (I-R. 21-24) and order (I-R. 37) of the District Court are not officially reported.

JURISDICTION

This appeal is from an order by the District Court of Guam dismissing this action. The order was entered on September 16, 1966. (I-R. 37.) Jurisdiction was conferred on the District Court by Section

22 of the Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1964 ed., Sec. 1424). On September 19, 1966, a notice of appeal was filed. (I-R. 38.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court correctly dismissed the complaint because the instant action is, in substance, an unconsented suit against the United States.

2. Whether the District Court correctly dismissed the complaint because appellants, as members of the Guam Legislature, and citizens, taxpayers, electors, and residents of Guam, were without the requisite standing to sue.

STATEMENT

This is an appeal from an order of the District Court of Guam dismissing the complaint herein (I-R. 1-4) for lack of jurisdiction of the subject matter. The complaint alleged that appellants Camacho and Salas were members of the Eighth Guam Legislature and citizens, taxpayers, electors, and residents of Guam. Appellee was Commander, Naval Forces, Marianas, at the time of the institution of this action. (I-R. 21)[1] The United States Navy, through an in-

[1] Since the institution of this action, appellee has been reassigned from Guam and from the position of Commander, Naval Forces, Marianas. Appellants' motion to remand the case to the District Court so that they could name additional defendants was denied by this Court on September 15, 1967. See Rule 13(4) of the Rules of the United States Court of Appeals for the Ninth Circuit.

strumentality thereof, the Commissioned Officers' Mess, has for many years imported alcoholic beverages into a United States Military Reservation located on Guam for sale to its personnel authorized under the regulations of the Department of Defense. (I-R. 22.)

Section 25600 of the Government Code of Guam provides that alcoholic beverages may be brought into the territory of Guam from outside of Guam for delivery or use within the territory only when the alcoholic beverages are consigned to a licensed wholesaler. (I-R. 21-22.) In the initial complaint, the prayer for relief was limited to a demand for a preliminary injunction prohibiting appellee both individually and as Commander, Naval Forces, Marianas, from transporting and importing intoxicating liquors and alcoholic beverages into Guam for delivery and use therein except on consignment to a licensed wholesaler so that the alcoholic beverage taxes of Guam would be paid. (I-R. 3-4, 22-23.)

In its findings of fact and conclusions of law, the District Court held that the action herein was an unconsented suit against the United States and that appellants were without standing to sue. (I-R. 23.)[2] Accordingly, after a hearing (I-R. 40-48), the complaint was dismissed with leave to file an amended complaint seeking a permanent injunction (I-R. 25).

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[2] The District Court also suggested, with respect to the merits, that the importation of alcoholic beverages into and for use on a military reservation, despite the fact that the military reservation is located in Guam, is not importation into the territory of Guam for use therein. (I-R. 23.)

In the amended complaint, appellants alleged that the Government of Guam had taken no action to enjoin the importation by appellee of alcoholic beverages into Guam and that a demand on the Government of Guam to do so would be futile. The amended complaint prayed for a permanent injunction against such activity. (I-R. 28.) After another hearing (II-R. 1-6), appellee's motion to dismiss the complaint for lack of jurisdiction over the subject matter (I-R. 32) was granted (I-R. 37). From that action, the instant appeal was taken. (I-R. 38.)

SUMMARY OF ARGUMENT

Appellants instituted the present action against Horace V. Bird, who was Commander, Naval Forces, Marianas, and an officer of the United States Government at the time of the commencement of the suit. They seek a permanent injunction against the importation of alcoholic beverages by the United States Navy into its military reservations in the territory of Guam without payment of the Guam taxes. Although the action is nominally against appellee, it is in substance a suit for specific relief against the United States. The well-settled doctrine of sovereign immunity instructs that such an action cannot lie against the sovereign in the absence of consent. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682. Since there is no contention that the United States has consented to the present action, the District Court correctly dismissed the suit.

Furthermore, in addition to the matter of sovereign immunity, appellants, as members of the Guam legis-

lature, and citizens, taxpayers, electors and residents of Guam, do not have standing to sue. They have not demonstrated that they have been affected directly or indirectly by the Government's action. *Massachusetts* v. *Mellon,* 262 U.S. 447, 488.

ARGUMENT

I

The District Court Correctly Dismissed the Complaint Because the Present Action Is, In Substance, an Unconsented Suit Against the United States

Although appellants have nominally instituted the present action against Horace V. Bird, formerly the Commander, Naval Forces, Marianas, and on officer of the Government, their stated purpose is to restrain the United States Navy, whether acting through the agency of the named defendant or any other person, from importing alcoholic beverages into its military reservations in the territory of Guam without payment of Guam taxes. (I-R. 3-4.) Such a suit constitutes an action against the sovereign since the judgment sought would plainly "expend itself on the public treasury or domain, or interfere with public administration" (*Ex parte State of New York, No. 1,* 256 U.S. 490, 502) and because the effect of such a judgment, if obtained, would be to restrain the Government from acting (*Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704). The well settled judicial policy, as repeatedly held by the Supreme Court, is to forbid suits against the sovereign without its consent. Such consent not having been given, the District Court had no jurisdiction and correctly dismissed the

complaint. *Dugan* v. *Rank*, 372 U.S. 609; *Malone* v. *Bowdoin*, 369 U.S. 643, *Larson* v. *Domestic & Foreign Corp., supra.* See also *Hawaii* v. *Gordon*, 373 U.S. 57, 58, and *Crain* v. *Government of Guam*, 195 F. 2d 414 (C.A. 9th).

In discussing the principle of sovereign immunity from an unconsented suit in *Larson* v. *Domestic & Foreign Corp., supra*, Chief Justice Vinson, pp. 687-693, disposed of all of the contentions directly or indirectly advanced by the instant appellants. It is there said, for example (pp. 687-688), that:

> The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it fust fail, whether or not the officer might otherwise be suable.
>
> If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. * * * But controversy there has been, in this field above all others, because it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. * * * the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. *For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained.* As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is

> not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. (Emphasis supplied.)

As further set out in *Larson* v. *Domestic & Foreign Corp.*, *supra*, pp. 689-690, the principle of sovereign immunity applies with only two exceptions—neither of which obtains here. The first is where the powers of the named defendant are specifically limited by statute and the act sought to be enjoined is in violation of that limitation. Here, appellants do not allege, or cite, any statutory limitation upon the power of the appellee to bring alcoholic beverages into the federal military reservation on Guam—either with or without payment of taxes.[3] This he did in the exer-

[3] Appellant maintains (Br. 9) only that, because importation of alcoholic beverages is merely "authorized" by Department of Defense regulations, it does not constitute exercise of a sovereign function. But the regulations in question were issued pursuant to authority granted to the Secretary of Defense by Section 6 of the Universal Military Training and Service Act, c. 144, 65 Stat. 75 (50 U.S.C. Appendix, 1964 ed., Sec. 473), to "make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces * * * at or near any camp, station, post or other place primarily occupied by members of the Armed Forces * * *." The contention is, therefore, patently incorrect.

cise of his official judgment as an act calculated to contribute to the efficient maintenance of the military base and its personnel. His construction of the Guam law as not requiring payment of Guam taxes thereon was also made in the exercise of his official powers and within the ambit of the responsibilities entrusted to him. It is made clear in *Larson* v. *Domestic & Foreign Corp.*, *supra*, pp. 690, 692, that a claim that the defendant had erred in the exercise of a power granted to him will not void the immunity from unconsented suit.

Finally, the Court emphasized the plenary protection conferred by the immunity rule where, as here, it is sought to enjoin the sovereign, saying (p. 703):

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief. For it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole,*

cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. (Emphasis supplied.)

In short, the considerations giving rise to the policy of sovereign immunity are all present in the case at bar; on the other hand, none of those are present which have occasionally been made the basis of an exception. The essential functions of the Government cannot be stopped by appellants, who apparently desire merely to assert the Guam tax against the United States. Accordingly, the District Court properly recognized that it was without jurisdiction to decide the instant unconsented suit and correctly dismissed the complaint.

II

The District Court Correctly Dismissed the Complaint Because, In Addition to the Matter of Sovereign Immunity, Appellants, as Members of the Guam Legislature and Citizens, Taxpayers, Electors and Residents of Guam, Were Without the Requisite Standing to Sue

Appellants brought the instant action in their capacity of members of the Guam Legislature, and citizens, taxpayers, electors and residents of Guam. (I-R. 1.) We submit that, even if there were here no sovereign immunity, the court below correctly held that appellants lack standing to sue because they have not shown that they have sustained or are immediately in danger of sustaining some direct injury as opposed to merely suffering "in some indefinite way in common with people generally." *Massachusetts* v. *Mellon*, 262 U.S. 447, 462. See also *Anti-Fascist*

Committee v. *McGrath*, 341 U.S. 123, 149-157 (concurring opinion of Justice Frankfurter).

Although appellants' complaint alleged that the Government of Guam has been deprived of tax monies due under the Alcoholic Beverage Tax Act of Guam (I-R. 3), they have not shown that they have been affected with sufficient directness. Appellants have not demonstrated with any specificity that immunity from the Guam tax of the alcoholic beverages imported by the United States Navy has in any way added measurably to their tax burden. *Sheldon* v. *Griffin*, 174 F. 2d 382, 383 (C.A. 9th). Cf. *Reynolds* v. *Wade*, 249 F. 2d 73 (C.A. 9th). Nor can they invoke the authority which allows taxpayers of a municipality standing to sue to prevent certain expenditures. This theory is grounded upon the analogy of residents of a municipality to shareholders of a corporation. Cf. *Crampton* v. *Zabriskie*, 101 U.S. 601. See also *Bradfield* v. *Roberts*, 175 U.S. 291.

Clearly, any cause of action which might lie against the United States for taxes due under the Guam statute belongs to the Government of Guam, and not to appellants. What they appear to complain of is the alleged failure of the Government of Guam to attempt to collect the tax from the United States. Thus, even if appellants had a litigable right with respect to such taxes, it would only be by way of an action against the Government of Guam to compel it to attempt collection.[4]

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[4] But, in fact, appellants have no cause of action even to compel the Government of Guam, through its Attorney Gen-

Finally, as the District Court emphasized in its final disposition of the case (II-R. 1-6), the Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1964 ed., Secs. 1421-1426) does not provide for any right of action by citizens of Guam to compel their government to take any particular course of action. On the contrary, the Organic Act of Guam, *supra*, Section 21 (48 U.S.C. 1964 ed., Sec. 1423k) provides: "The legislature or any person or group of persons in Guam shall have the unrestricted right of petition." *Cf. Smith* v. *Government of Virgin Islands*, 329 F. 2d 131 (C.A. 3d); *Buscaglia* v. *District Court of San Juan*, 145 F. 2d 274, 284 (C.A. 1st). Since there is no right of action given appellants by statute, or by the United States Constitution, adverse personal interest is required. Cf. *Parker* v. *Fleming*, 329 U.S. 531; *Coleman* v. *Miller*, 307 U.S. 433. None has here been shown.

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eral, to adopt their interpretation of the Alcoholic Beverages Act—a matter clearly subject to that officer's discretion. *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177-178.

CONCLUSION

In the light of the foregoing, the order of the District Court is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of ....., 1967.

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Attorney

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